



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in a Petition for Reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding

**FROM:** Justina Fugh **Justina Fugh** Digitally signed by Justina Fugh  
Date: 2021.01.14 18:12:03 -05'00'  
Alternate Designated Agency Ethics Official and  
Director, Ethics Office

**TO:** Adam Gustafson  
Deputy General Counsel

Prior to entering federal service on March 29, 2020, you were a partner at Boyden Gray & Associates, providing legal and lobbying services to a variety of clients. Now, as Deputy General Counsel of the United States Environmental Protection Agency (EPA), you seek to participate in a specific party matter in which one of your former clients, the Competitive Enterprise Institute (CEI), is a party. You indicate that you did not yourself work personally and substantially on that same matter. You have received a waiver from the White House Counsel's office and now seek an impartiality determination from me. Your request is granted. This memorandum confirms in writing the determination I made on January 13, 2021.

**NEED FOR A PLEDGE WAIVER**

Pursuant to Executive Order 13770, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client is a party or represents a party. Given the Agency's interest in having your participation in certain matters, the EPA sought a waiver of the provisions of Section 1, paragraph 6 of the Ethics Pledge on your behalf. This waiver, which was granted on June 17, 2020, authorized you to participate personally and substantially in specific litigation as well as other potential cases arising at EPA in which your former client, CEI, is a party, provided that you did not previously participate personally and substantially in that same matter for CEI or any other party. *See attachment.*

**NEED FOR IMPARTIALITY DETERMINATION**

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, "Impartiality in Performing Official Duty." For one year from the date your last provided services to CEI, you have a "covered relationship" with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in

any specific party matter in which CEI is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel in specific party matters in which CEI is a party, provided that you did not participate personally and substantially in the matter previously with CEI or any other party. In making this determination to enable you to effectively carry out your duties as Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – A graduate of the University of Virginia and Yale Law School, you clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, you were an associate at Cooper & Kirk where you specialized in appellate litigation. While at Boyden Gray & Associates, you represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act (CAA) matters. You have argued CAA appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on CAA regulations. Through this work, you have gained extensive experience in CAA regulations and litigation.

Effect of the matter upon your financial interest – You have no continuing financial interest with CEI, nor do you have any financial interest in the outcome of this petition for reconsideration.

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in defense of agency actions. In the position of Deputy General Counsel, you must be able to provide legal counsel and vital input into the Agency's defense. Your invaluable knowledge and experience with Clean Air Act regulations and litigation are of great

importance in advocating the interests of the Agency in its consideration of this petition and in advising the Acting General Counsel and Administrator.

Sensitivity of the matter – Your participation in this specific party matter, including decisions the Agency makes at this point in this Administration, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

Difficulty of reassigning the matter to another employee – Your expertise and comprehensive understanding of CAA regulations and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. You were hired because of your extensive CAA expertise which is needed to counsel and advise the EPA Administrator and senior leadership on behalf of the Agency.

Under this limited authorization, you may participate personally and substantially in the CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding. I determine that your expertise is needed for similar reasons as described above. Thus, this authorization permits you to participate in other specific party matters in which CEI is a party provided that you did not previously participate personally and substantially while serving as an attorney for CEI or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to such cases even if CEI is present. But you must remain recused from those specific party matters in which your former client is a party if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the President's Ethics Pledge and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh of OGC/Ethics or me.

#### Attachment

cc: David Fotouhi, Acting Principal Deputy General Counsel  
 Jim Payne, Designated Agency Ethics Official and Deputy General Counsel for  
 Environmental Media and Regional Law Offices  
 Elise Packard, Deputy General Counsel for Operations  
 Kamila Lis-Coghlan, Deputy General Counsel

MEMORANDUM

TO: JAMES PAYNE  
DEPUTY GENERAL COUNSEL FOR ENVIRONMENTAL MEDIA AND  
REGIONAL LAW OFFICES, AND  
DESIGNATED AGENCY ETHICS OFFICIAL  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FROM: SCOTT F. GAST  
DEPUTY COUNSEL AND DEPUTY ASSISTANT TO THE PRESIDENT  
THE WHITE HOUSE

DATE: June 17, 2020

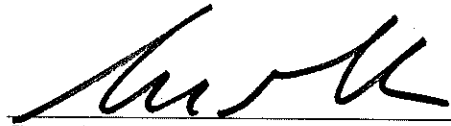
SUBJECT: Limited Waiver of Section 1, Paragraph 6 of Executive Order 13770

Official: Adam Gustafson  
Deputy General Counsel  
United States Environmental Protection Agency

After reviewing your limited waiver request memorandum, I hereby provide a limited waiver of the requirements of Section 1, paragraph 6 of Executive Order 13770 to Mr. Adam Gustafson to allow him to participate in specific party matters, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), despite the involvement of his former client, the Competitive Enterprise Institute (CEI). I have determined that it is in the public interest to grant this limited waiver because of Mr. Gustafson's extensive experience in Clean Air Act regulation and litigation, the fact that he did not previously participate in the *American Lung Association* litigation, and the importance of his involvement in this specific party matter to assist with the Administration's defense of the Affordable Clean Energy (ACE) Rule.

In light of the importance of the aforementioned efforts to the Trump Administration and to the United States Environmental Protection Agency, a limited waiver of the provisions of paragraph 6 of the Ethics Pledge (contained in Section 1 of Executive Order 13770) is justified for Mr. Gustafson so that he can effectively carry out his duties as Deputy General Counsel and ably advise the EPA Administrator and senior leadership. Accordingly, I authorize Adam Gustafson to be able to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), and any other potential cases arising at EPA where CEI is a party and Mr. Gustafson did not previously participate personally and substantially while serving as an attorney for CEI or any other party. He will be allowed to participate in those specific party matters, including meetings or communications related to such cases where CEI is present. However, he will remain recused from those specific party matters in which his former client is a party if he had himself participated personally and substantially previously.

This limited waiver does not affect the application of any other provision of law, including any other provision of the Ethics Pledge; the Standards of Ethical conduct for Employees of the Executive Branch (5 C.F.R. Part 2635); or the criminal bribery, graft and conflict of interest statutes (18 U.S.C. §§ 201-209; or the Hatch Act (5 U.S.C. § 7323).



Scott F. Gast

Deputy Counsel and Deputy Assistant to the President

Dated: \_\_\_\_\_

6/17/2020